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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 129

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN,
Respondents.

No. 130

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Kentucky Fuel Gas Corporation, and MORRIS GREEN,
Respondents.

No. 131

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, Trustee for American Fuel and Power Company, et al., and LOUIS A. GREEN, and ROBERT HEILBRUNN, as a committee for Noteholders,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR COLUMBIA GAS & ELECTRIC CORPORATION

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August 7, 1946

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REPLY BRIEF FOR COLUMBIA GAS & ELECTRIC CORPORATION

All of the briefs filed in opposition to our petition for certiorari, that is to say, the brief of the Government, the

brief of the Committee representing the Inland Gas Bondholders and the brief of the Committee representing American Fuel and Power Noteholders, go on the theory that the question on which we ask this Court to pass, namely,

> "Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquiring the credit he violated the anti-trust laws, be subordinated to other creditors?"

is not involved in the case because the Court below decided it on the ground that

> "* * * when a controlling stockholder of a corporation manages its affairs so as to promote, not the interests of the corporation but those of the controlling stockholder, a bankruptcy court will subordinate the claims of the wrongdoer to the claims of creditors and minority stockholders injured by this breach of trust." (Government's brief, pp. 11-12)

This position of our opponents is not borne out either by the record or by the findings of the District Court or by the opinion of the Circuit Court of Appeals below. On the contrary, the record and the findings and the opinion are replete with statements showing that both lower courts did decide that it was just because Columbia Gas & Electric Corporation (hereinafter called Columbia) had violated the Federal anti-trust laws in acquiring the securities in question, that the securities in its hands should be unenforcible in the bankruptcy proceeding.

The very first sentence of the opinion of the Circuit Court of Appeals (Vol. 9, p. 3; 151 Fed. 2d at 462) says that

> "* * * we meet again in these appeals *the basic problem* encountered in In re American Fuel &

> Power Co., 122 F. 2d 223. That case involved appeals by creditors of Kentucky gas corporations in Chapter X, bankruptcy reorganization proceedings from orders authorizing and directing trustees to consummate a proposed settlement of cross-demands between the debtors and the Columbia Gas & Electric Corporation, the present appellant. The orders were attacked *on the ground that the stock interests and securities of the debtors had been acquired by Columbia from the public for purposes condemned by and in violation of § 7 of the Clayton Act, 15 U. S. C. A. § 18.*" (Italics ours)

Here is a straight statement by the Circuit Court of Appeals of the "basic problem" involved, namely, that the issue was the effect of the Federal anti-trust laws on the enforcibility of the Columbia-owned securities.

Next, in reviewing the findings of the District Court the Circuit Court of Appeals (Vol. 9, p. 12) reiterated the finding of the lower court that

> "* * * Columbia, its executive officers, directors and certain of its corporate subsidiaries, were engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize trade and commerce in natural gas in and between the states of Kentucky, Ohio, West Virginia, Indiana and Michigan, that the claims presented by and on behalf of Columbia against the debtors, American Fuel, Inland and Kentucky Fuel, were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy,"

and then went on to say (same page)

> "*Wherefore,* in applying the principles of law announced by this court in the American Fuel and

> Power case, supra, it concluded it to be the duty of the Bankruptcy Court to withhold its aid from parties seeking benefit from an agreement tinged with illegality, and that under the facts of record it was not required to approve the claims or stock interests of Columbia." (Italics ours)

That, again, is a straight statement that the issue was the effect on the Columbia-owned securities of the alleged breach of the Federal anti-trust laws.

These statements of the Circuit Court of Appeals simply follow the decision of the same court in the prior American Fuel & Power Company case (122 Fed. 2d 223) so referred to by it, the concluding paragraph of the opinion in which read that (Vol. I, p. 687)

> "The orders of the lower court are reversed and the causes remanded, with direction to fix the division of creditors and stockholders of the debtors into classes according to the nature of their respective claims and stock and it is further ordered that all claims or stock *interest of the Columbia in the debtors', title to which it acquired in violation of Section 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 18, be rejected and the Columbia take nothing thereby.*" (Italics ours)

Likewise the findings of the District Court were all directed to the anti-trust issue rather than to an injury to the creditors. See the findings where the District Court emphasized "the precarious financial position of American Fuel and its subsidiaries" prior to the Columbia purchase (Vol. I, p. 594), and the fact that these companies "due to their heavy burden of securities and burdensome gas contracts" "were never able to earn their fixed charges" (*ibid*),

and that in the consequent "dubious financial condition of American Fuel and its subsidiaries" (Vol. I, p. 595) the project of the Detroit line was "its only hope of survival" (*ibid*), to attempt which was "an ambitious plan" (*ibid*), the outcome of which lay "entirely in the realm of speculation" (Vol. I, p. 600). These findings could not possibly become the basis of an opinion that Columbia deliberately injured the other bondholders by terminating the Detroit project. Instead they lead up to the Conclusion of Law of the District Court that

> "3. The conspiracy, pursuant to which Columbia acquired the claims herein asserted against the debtor, as found and described in paragraph No. 17 of the Findings of Fact was in violation of the Antitrust Laws of the United States, to-wit: The Sherman Act and The Clayton Act.
>
> "4. The following conclusions of Law stated by the Circuit Court of Appeals of the Sixth Circuit in its opinion, In re American Fuel and Power Company, 122 F. (2d) 223, are here applicable and controlling, to-wit:
>
> "(a) 'It is the duty of the Bankruptcy Court in reorganization proceedings to withhold its aid from parties seeking to obtain a benefit from an agreement tinged with illegality'."

Furthermore, this is the position that the Government has heretofore taken in this matter. The Government in its petition for intervention alleged that (Vol. I, pp. 274-5):

> *"The United States seeks leave to intervene as aforesaid in these proceedings in furtherance of its public duty to enforce the antitrust laws;* and, as a 'party in interest' within the meaning of the bank-

> ruptcy Act, as amended, (11 U.S.C. Sec. 607), is entitled to participate fully, with the rights of a party, in any proceedings involving the question of whether or not the Columbia Gas & Electric Corporation acquired, and used, its claims against the debtor in the above-entitled cause in violation of the antitrust laws of the United States." (Italics ours)

Likewise the Government in its Statement Opposing Jurisdiction filed in the United States Supreme Court in opposition to Columbia's appeal under the Expediting Act (322 U. S. 379) took the position that the language of the Expediting Act did not permit the appeal since (Vol. I, p. 703):

> "The Government's complaint in intervention in the present case cannot be brought within this language since there was no prayer for injunctive relief, but *merely a prayer for an adjudication that Columbia had violated the antitrust laws, that it had acquired its claims against the debtors in violations of these laws, and that the district court reject these claims.*" (Italics ours)

and also in the same Statement said as follows (Vol. I, p. 702):

> "The district court, after a hearing in which Columbia participated, made findings of fact and conclusions of law (attached as Exhibit B to the Jurisdictional Statement of Columbia) which set forth that Columbia had acquired its claims against the debtors pursuant to an unlawful conspiracy to restrain and monopolize interstate commerce in natural gas and that claims *so acquired* are not provable or allowable in bankruptcy reorganizations. On the basis of these findings and conclusions the court entered judgment rejecting all claims of Columbia against the debtors." (Italics ours)

Having been allowed to intervene in furtherance of what it alleged was its public duty to enforce the anti-trust laws and on the express theory that securities must be held to be unenforcible because acquired in violation of the anti-trust laws, and having reiterated this in its subsequent Statement Opposing Jurisdiction filed in this Court, how can the Government in all fairness say, as it does now in its brief, that the point is not involved in the case?

Similar expressions occur in the pleadings of the other parties to the cause who oppose the granting of our petition (Vol. I, pp. 399, 521, 522).

As to the argument of the various briefs that the decision of the Circuit Court of Appeals below simply decides that

> "* * * when a controlling stockholder of a corporation manages its affairs so as to promote, not the interests of the corporation but those of the controlling stockholder, a bankruptcy court will subordinate the claims of the wrongdoer to the claims of creditors and minority stockholders injured by this breach of trust," (Government's brief, pp. 11-12)

the decision of that Court is not to that effect. Indeed, it could not be because Columbia controlled the operating subsidiaries of the American Fuel & Power Company (the top holding company of the system) by majority stock ownership of the latter only between the dates of November 6, 1930 and December 2, 1930 (Vol. I, p. 598; Vol. 4, p. 1530), or less than a month. On this latter date of December 2, 1930 a Receiver of the operating subsidiaries of the American Fuel and Power Company was appointed by the Federal Court and took over their control and operation (Vol. I, pp. 29, 38). There is no finding of the District

Court that during this brief interval of less than a month Columbia ordered the discontinuance of the proposed Detroit line. In the District Court we requested the Court to find that the project to build the Detroit line had been abandoned by the original promoters even before the Columbia's purchase. We still believe that the record justifies such a finding. However, the District Court did not find as requested, but neither did it find that it was Columbia which was responsible for the discontinuance. On the contrary, it is found that it was the Federal Receiver who decided not to go ahead with the construction of this line. The finding of the District Court is that it was the Federal receivership which "resulted in immediate discontinuance of all efforts to promote the Detroit project" (Vol. I, p. 599). And there is no finding that the Federal Receiver was acting in collaboration in this matter with Columbia; in fact, a preliminary finding that there was such collaboration was expressly rejected by the District Court (Vol. I, p. 603).

In view of the foregoing, the decision of the Circuit Court of Appeals and the decision of the District Court must each stand on the single ground that, because it held that Columbia purchased these securities in violation of the Federal anti-trust laws, therefore Columbia cannot enforce them as against the other security holders. This is the question clearly presented by the record. Its importance in the administration of the bankruptcy laws and of the anti-trust laws cannot be overestimated. A final decision on the question by this Court is greatly to be desired by the business of the country for its guidance. It would be indeed a miscarriage of federal justice in a case of this importance to deny a petition for certiorari on the ground that the decision of the Courts below was of an entirely different character

from what their findings of fact and conclusions of law stated.

We, therefore, respectfully reiterate our request in our petition that the same be granted.

Respectfully submitted,

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